

STATE OF MICHIGAN
COURT OF APPEALS

SHAGBARK DEVELOPMENT, INC.,
NORTHLAND MANAGEMENT, INC. and LEE
VAN POPERING,

UNPUBLISHED
June 17, 2004

Plaintiffs-Appellants,

v

LYNN DEMANN,

No. 245713
Kent Circuit Court
LC No. 02-004325-NO

Defendant-Appellee.

Before: Neff, P.J., and Zahra and Murray, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order dismissing this defamation suit with prejudice. We reverse.

This is a defamation action in which plaintiffs charged defendant with publication of false and defamatory statements regarding the construction of a condominium project. While plaintiffs' complaint does not identify the specifics of the publication of the statements, in answers to interrogatories plaintiffs indicated that the statements were made at a township board meeting and later published in a newspaper article a week after the meeting.

Defendant's answer to plaintiffs' complaint claimed, among other things, that the statements were subject to a qualified privilege, but did not identify the basis of the claimed privilege. Defendant later, in her brief in support of ah MCR 2.116(C)(10) (no genuine issue of material fact) motion for summary disposition, claimed absolute privilege for her statements under the Petition Clause of the First Amendment to the United States Constitution.

The trial court granted defendant's motion for summary disposition and dismissed this case, accepting defendants' argument that the allegedly defamatory statements at issue were absolutely privileged under the *Noerr-Pennington* doctrine¹ because they were made in the

¹ *Eastern Railroad Presidents Conference v Noerr Motor Freight, Inc*, 365 US 127; 81 S Ct 523; 5 L Ed 2d 464 (1961), and *United Mine Workers of America v Pennington*, 381 US 657; 85 S Ct 1585; 14 L Ed 2d 626 (1965). In brief, the *Noerr-Pennington* doctrine generally precludes
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course of successful First Amendment petitioning activity directed at the Caledonia Township Board. Plaintiffs argue that neither the *Noerr-Pennington* doctrine nor the Petition Clause of the First Amendment provide such an absolute privilege for defamatory statements made in the course of successful petitioning activity.

We review the trial court's decision on the motion for summary disposition *de novo*. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 369; 666 NW2d 251 (2003). In doing so, we view the pleadings and admissible evidence in the light most favorable to the nonmoving party. *Id.*

Resolution of this appeal is controlled by our Supreme Court's decision in *J & J Construction Co v Bricklayers and Allied Craftsmen, Local 1*, 468 Mich 722; 664 NW2d 728 (2003), which was issued in the interval between the filing of plaintiffs' brief on appeal and the filing of defendant's brief on appeal.

The facts of *J & J Construction* are similar to the facts of this case. The defendant in *J & J Construction* was a union representative who appeared before the city commission to speak against accepting plaintiff's bid to perform work for the city. As a result of defendant's comments plaintiff lost the contract even though it was the low bidder. Plaintiff sued defendant for defamation and tortious interference with business expectations. Defendant claimed privilege because his comments were made while petitioning the government. As in this case, the plaintiff in *J & J Construction* was a private figure. *Id.* at 724-728

In turning aside the defendant's claims of privilege our Supreme Court concluded that there is no constitutional qualified immunity for defamation of a private figure when such defamation is made while petitioning the government. The Court went on to hold that the standard of proof required of a private-figure defamation plaintiff is ordinary negligence. *Id.* at 735. The basis of the Court's Petition Clause decision was *McDonald v Smith*, 472 US 479; 105 S Ct 2787; 86 L Ed 2d 384 (1985).²

There is no question in this case that plaintiffs are private figures. As such, plaintiffs need only prove ordinary negligence to establish defamation where the right to petition is involved and defendant has no constitutional qualified immunity under the Petition Clause. *Id.*

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petitioning that is directed at influencing policy or lawmaking decisions by governmental entities from being considered a violation of federal antitrust laws in order to avoid a potential or actual conflict between the antitrust laws and the Petition Clause of the First Amendment.

² Interestingly, Justice Young who wrote the majority opinion in *J & J* in which he relied on *McDonald*, went on to write a separate concurring opinion in which he expressed his strong opinion that *McDonald* was wrongly decided by the United States Supreme Court and that were it not for the *McDonald* Court's decision he would find absolute immunity for Petition Clause activity.

That is, contrary to the trial court's analysis, there is no absolute privilege under the Petition Clause or the *Noerr-Pennington* doctrine for defamatory statements made in the course of petitioning activity. Further, the result in *J & J Construction* precludes acceptance of the trial court's view that a defamation action cannot be based on a statement made in the course of *successful* petitioning activity; the Court in *J & J Construction* reinstated the judgment in favor of the plaintiff on its defamation claim where the defamatory remarks were part of a successful effort to persuade a city council not to award a contract to the plaintiff. *Id.* at 724-726, 735.

Defendant also argues that the allegedly defamatory remarks in this case are protected by a common law privilege separate from the First Amendment. However, that issue is not ripe for consideration by this Court in the current posture of this case. Defendant's motion for summary disposition was predicated entirely on a claim of absolute privilege under the Petition Clause and the *Noerr-Pennington* doctrine and did not raise a claim of common law privilege. Accordingly, the trial court's analysis with regard to this matter was based entirely on its understanding of the *Noerr-Pennington* doctrine and First Amendment case law.

We reverse the trial court's orders granting summary disposition in favor of defendant and dismissing this case and remand the case to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Brian K. Zahra
/s/ Christopher M. Murray